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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DANOVAN NGUYEN, Plaintiff and Appellant, v. CHRISTOPHER H. NGUYEN et al., Defendants and Respondents.	G039693 (Super. Ct. No. 04CC12110) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James P. Gray, Judge. Reversed and remanded.

Law Office of Ralph C. Larsen and Ralph C. Larsen, Thomas C. Nguyen & Associates and Thomas C. Nguyen for Plaintiff and Appellant.

Ford, Walker, Haggerty & Behar and Paul Christensen for Defendants and Respondents.

Danovan Nguyen (Danovan) appeals from a judgment in favor of Christopher H. Nguyen and Christopher H. Nguyen, D.M.D., M.S.D., a Professional Dental Corporation (collectively, Dr. Nguyen) entered after Dr. Nguyen prevailed on a motion for summary judgment in this malpractice action. Among other arguments, Danovan contends the only evidence offered to show the absence of negligence (an expert declaration) was inadmissible, so summary judgment should have been denied. We agree and reverse.

FACTS

In late 1998, Danovan consulted Dr. Nguyen about orthodontic treatment. Dr. Nguyen proposed a treatment plan, which was approved by Danovan's father (he was then a minor). Between 1999 and 2001, Dr. Nguyen provided professional services to Danovan, which included extracting four teeth and installing orthodontic devices. At some point thereafter Danovan experienced severe jaw pain. In 2003, after reaching the age of majority, he consulted another dentist and was told he suffered from temporomandibular joint dysfunction and other dental problems. The instant action followed.

The complaint was filed in December 2004. A third amended complaint (the pleading in issue) alleged Dr. Nguyen was negligent in his treatment and failed to disclose the risks of extractions or discuss alternative treatments. Causes of action were set out for negligence, failure to obtain informed consent, and battery.[1]

The summary judgment motion, served on April 17, 2007, was supported by three declarations. One was from Dr. Nguyen, who described his treatment of Danovan. An attorney's declaration (from Jason B. Friedman) attached as an exhibit

[1] The complaint is divided into "class allegations" and "individual causes of action," the latter being those set out above. The class allegations, later dismissed, asserted Dr. Nguyen had engaged in false and misleading advertising when he offered free examinations and consultations, and special services for families and orthodontic problems. Causes of action were asserted for unfair competition (Bus. & Prof. Code, § 17200 et. seq.), false advertising (Bus. & Prof. Code, § 17500 et seq.), violation of the Consumers Legal Remedies Act (Civ. Code, § 1750 et. seq.), negligent and intentional misrepresentation, and concealment.

what he described as "a copy of the [d]ental [c]hart of Danovan Nguyen." Nothing more was said about the chart. Included among the papers purporting to be the chart is an *unexecuted* "Declaration of Custodian of Records," which carries the legend "Required by Evidence Code § § 1560, 1561" at the top of the page.

The third declaration came from Dr. Allan Sheridan, an orthodontist who offered an expert opinion. Dr. Sheridan declared he had reviewed Dr. Nguyen's records of treating Danovan and had examined the young man. He said Dr. "Nguyen's . . . chart indicates an orthodontic treatment plan that calls for extractions of the upper and lower premolars as well as orthognathic jaw surgery, in order to remediate [Danovan's] Class III occlusal status." Dr. Sheridan opined "[t]he treatment provided to Danovan Nguyen, including the orthodontic treatment plan, consisting of extractions of the premolars, met the standard of care for members of the orthodontic profession and is what any other competent orthodontist would have done under the circumstances. . . . [T]here is nothing that Dr. Nguyen did or failed to do that caused any damage to . . . Danovan Nguyen." Dr. Sheridan did not attach a copy of the chart he relied on, nor did he refer to the ostensible chart proffered in the attorney declaration. An attached curriculum vitae listed among Dr. Sheridan's professional associations "Member Temporomandibular Joint Study Group," and indicated his teaching activities included "Lecturer/participant at TMJ Study Group."

Danovan objected to the Sheridan declaration as lacking foundation and as hearsay, since Dr. Nguyen's records were neither authenticated nor shown to be business records exempt from the hearsay rule. To counter Dr. Sheridan's opinion, Danovan offered an unauthenticated letter from Dr. Viet-Nguyen, another dentist. The letter, addressed to one of Danovan's attorneys, said "[s]ince my deposition . . . on March 19, 2007, I have [been given] access to a copy of the orthodontic treatment chart rendered to [Danovan] Nguyen by Dr. Christopher Nguyen. [¶] My opinion now is: [¶] The orthodontic treatment performed by Dr. Christopher Nguyen is SUB-STANDARD and

HARMFUL to . . . [Danovan] Nguyen." From other documents in the record, it appears Dr. Viet-Nguyen was the dentist Danovan consulted after he became dissatisfied with Dr. Nguyen. Danovan had deposed Dr. Viet-Nguyen without having designated him as an expert witness, and at that deposition the latter had testified Dr. Nguyen's treatment of Danovan did not fall below the standard of care for orthodontists. The chart Dr. Viet-Nguyen referred to was the one accompanying Dr. Nguyen's April 17, 2007 motion for summary judgment.

Danovan also requested a continuance to allow him to depose Dr. Nguyen and obtain documents from him. He claimed to have served a notice of deposition and demand for production on April 16, 2007, the day before the summary judgment motion was served. We say "claimed" because the copy of the notice/demand accompanying the opposition is unsigned, without a proof of service. Danovan canceled the deposition two days prior to the scheduled date (May 16, 2007), notifying Dr. Nguyen it would be held at an unspecified date in the future.

The motion was heard in July 2007. The trial judge refused to continue the matter, finding the case had been pending for two and one half years and Danovan failed to explain his failure to conduct discovery during that time. Observing Donovan had yet to designate an expert witness, the judge granted summary judgment on an apparently unique theory: "The plaintiff . . . still does not have an expert[.] [T]hat is an admission . . . the defendant's position is genuine and . . . plaintiff has no reasonable expectation of carrying [his] burden or presenting evidence . . . to show . . . the defendant professionally fell below the standard of care."[2]

[2] Respondent has not pursued that theory in this court.

DISCUSSION

Danovan argues the Sheridan declaration was inadmissible, so Dr. Nguyen failed to carry his burden of showing the negligence claim cannot be established. We agree.

An expert opinion as to matters not in evidence has no probative value and is insufficient to support summary judgment. Where there is no independent proof of a patient's treatment, an expert may not establish those facts through the guise of relating the contents of medical records upon which he relied in forming his opinion. (*Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 743.)

The *Garibay* decision is informative. In that malpractice case, the defendant physician moved for summary judgment on the strength of an expert declaration from another physician, who related the treatment provided by the defendant based on medical records furnished to him. The expert then offered his opinion the defendant had complied with the standard of care. (*Garibay v. Hemmat, supra*, 161 Cal.App.4th at pp. 739-740.) The underlying medical records were not offered in evidence, nor was there any other evidence of the allegedly negligent medical procedure. The court held the expert's declaration had no evidentiary value and it was insufficient to warrant summary judgment for the defendant physician. It explained "Dr. Frumovitz had no personal knowledge of the underlying facts of the case, and attempted to testify to facts derived from medical and hospital records which were not properly before the court. Therefore, his declaration of alleged facts had no evidentiary foundation. An expert's opinion based on assumptions of fact without evidentiary support has no evidentiary value. [Citation.]" (*Id*. at p. 743.) That is precisely the situation here.

Dr. Nguyen's chart was not in evidence, so there was no foundation for Dr. Sheridan's opinion that treatment reflected in the chart met the standard of care for orthodontists. The Sheridan declaration was inadmissible, and without it there was no evidence Dr. Nguyen was not negligent, so summary judgment should have been denied.

Dr. Nguyen's several arguments to save the Sheridan declaration are to no avail. Confronted with the rather obvious oversight illuminated by the fact his moving papers in the summary judgment motion include an *unexecuted* "Declaration of Custodian of Records" (a declaration that carries the legend "Required by Evidence Code §§ 1560, 1561" at the top of the page), and apparently unable to mount a defense of the trial court's expressed basis for granting the motion, Dr. Nguyen tries gamely to salvage the ruling, but it has taken on too much water. The arguments are as follows.

Dr. Nguyen contends the chart was admissible because it was provided to Dr. Sheridan by counsel, who obtained it from Dr. Nguyen. But there is no evidence of that in the record. Counsel's declaration in support of the motion says only "a copy of the [d]ental [c]hart of Danovan Nguyen is attached" as an exhibit. The declaration is insufficient to either authenticate the chart (Evid. Code, § 1400) or satisfy the business records exception to the hearsay rule. (Evid. Code, § 1561, subds. (a), (c).) And even if the declaration said what Dr. Nguyen asserts it did, it would not authenticate the chart (no statement the attached documents were a true copy of all records pertaining to Danovan's treatment that were delivered to the attorney, see Evid. Code §§ 1401, 1561, subd. (c)), let alone get past the hearsay problem.

Next, Dr. Nguyen contends the chart was admissible because his declaration "painstakingly details the contents of his dental chart [for] plaintiff." That simply is not true. Dr. Nguyen's declaration explains his treatment of Danovan, but it makes no reference to either the chart or any other medical records of the treatment. So Dr. Nguyen's declaration is insufficient to place the chart in evidence.

Finally, Dr. Nguyen asserts the declaration is admissible because Dr. Sheridan stated he had examined Danovan. Still not good enough. Dr. Sheridan did not state what he had observed during the examination, nor offer any explanation why the result of the examination led him to conclude Dr. Nguyen's treatment met the applicable standard of care. As we have said above, in a medical malpractice case, "an [expert's]

opinion unsupported by reasons or explanations does not establish the absence of a material fact issue for trial, as required for summary judgment." (*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 524.) The bottom line is the Sheridan declaration was not evidence that Dr. Nguyen's treatment of Danovan met the standard of care expected of orthodontists.[3]

Since Dr. Nguyen failed to establish Danovan could not prove his negligence claim, the motion for summary judgment should have been denied. The judgment appealed from is reversed, and the matter is remanded. Appellant is entitled to costs on appeal.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.

[3] In light of our conclusion there was no evidence of non-negligence to support summary judgment, we need not reach Danovan's other arguments for reversal. They are: (1) the motion did not address Danovan's claims of failure to obtain consent and battery; (2) Dr. Sheridan was not qualified to give an expert opinion on temporomandibular joint dysfunction; (3) Dr. Viet-Nguyen's letter changing his deposition testimony and saying Dr. Nguyen was negligent raised a triable issue of fact; and (4) the motion should have been continued to allow Danovan to depose Dr. Nguyen and obtain documents from him.